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UNITED STATES COURT
DISTRICT OF IDAHO

JUN 28 2004

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UNITED STATES DISTRICT COURT
DISTRICT OF IDAHO

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POCATELLO DENTAL GROUP)
P.C., an)
Idaho professional corporation,)

Plaintiff,)

vs.)

INTERDENT SERVICE)
CORPORATION,)
a Washington corporation,)

Defendant.)

INTERDENT SERVICE)
CORPORATION,)
a Washington corporation,)

Counterclaimant,)

Case No.: CV-03-450-E-LMB

COUNTERDEFENDANT MISNER'S
MEMORANDUM IN OPPOSITION TO
COUNTERCLAIMANT INTERDENT
SERVICE CORP.'S MOTION FOR A
TEMPORARY RESTRAINING ORDER

123

vs.

POCATELLO DENTAL Group, P.C.)
an Idaho professional)
corporation; DWIGHT G.)
ROMRIELL, individually; LARRY)
R.)
MISNER, JR., individually; PORTER)
SUTTON, individually; ERNEST)
SUTTON, individually; GREGORY)
ROMRIELL, individually; ERROL)
ORMOND, individually;)
and ARNOLD)
GOODLIFFE, individually,)

Counterdefendants.)

LARRY R. MISNER, JR, individually)

Counterclaimant,)

vs.)

INTERDENT SERVICE)
CORPORATION,)
a Washington corporation,)

Counterdefendant.)

LARRY R. MISNER, JR. individually)

Crossclaimant,)
)
vs.)
)
POCATELLO DENTAL GROUP,)
P.C., an)
Idaho professional corporation,)
)
<u>Crossdefendant.</u>)

INTRODUCTION

Defendant and Counterclaimant Interdent Service Corporation¹ ("InterDent") asks this Court to restrain Counterdefendant and Counterclaimant Misner² ("Misner") from (1) the practice of dentistry within 20 miles of Plaintiff and Counterdefendant Pocatello Dental Group³, P.C.'s ("Dental

¹ Defendant and Counterclaimant Interdent Service Corporation "is a Washington corporation registered as a foreign corporation in the state of Idaho [which] provides services to [Dental] Group". *InterDent's Answer to Plaintiff's Amended Complaint and InterDent's Amended and Supplemental Counterclaims and Third Party Complaint ("InterDent's Amended Answer and Counterclaim")*, Answer ¶ 2. "[Interdent] is in the business of providing or arranging for management services, facilities, equipment and certain personnel necessary for the operation of dental practices." *InterDent's Amended Answer and Counterclaim*, Counterclaim ¶ 2. "[InterDent] provides management services, facilities and equipment to the [Dental] Group pursuant to the terms of the Management Agreement". *InterDent's Amended Answer and Counterclaim*, Counterclaim ¶ 20.

² Counterdefendant and Counterclaimant Misner is currently, and at all times relevant was, a "[p]rovider possess[ing] a valid, unrestricted license to practice dentistry in Idaho." *Misner's Dentist's Employment Agreement with Dental Group*, p. 1 (the existence of the Employment Agreement between Dental Group and Misner constitutes Recital E of the "Non-Compete Agreement" attached as Exhibit 1 to the Affidavit of Kevin Webb in Support of InterDent's Motion for Temporary Restraining Order) (excerpts from the Employment Agreement are attached as Exhibit 5 to Affidavit of Scott J. Kaplan in Support of InterDent's Opposition to Misner's Rule 12(b)(6) Motion to Dismiss Counterclaim)

³ Plaintiff and Counterdefendant Pocatello Dental Group, P.C. "is a professional corporation organized under the laws of the State of Idaho to provide the professional services of dentistry." *Misner's Dentist's Employment Agreement with Dental Group*, p. 1 (the existence of

Group's") office, (2) soliciting Dental Group's patients or employed dentists and (3) soliciting InterDent's administrative employees. *See InterDent's Motion for a Temporary Restraining Order*, p. 2.. Because there is no evidence that Misner has either solicited any employee of InterDent in the past or desires to solicit any employee of InterDent in the future, a Temporary Restraining Order restraining Misner from soliciting InterDent employees is neither necessary nor appropriate⁴.

But, before reaching the issue of the enforceability of the Non-Compete Agreement⁵ and thereby InterDent's Motion for a Temporary Restraining Order, this Court must closely review the nature of the relationship between InterDent, Misner and Dental Group. InterDent which is a Washington for-profit corporation seeks to enjoin Misner who is a licensed dentist in Idaho from competing with Dental Group which is an Idaho professional corporation. Perhaps even more unusual is the fact that InterDent as the defendant in this matter is attempting to enjoin Misner from competing with Dental Group who is the plaintiff suing Interdent for breach of the Management Agreement⁶ between InterDent and Dental Group. In fact, Dental Group has neither complained

the Employment Agreement between Dental Group and Misner constitutes Recital E of the "Non-Compete Agreement" attached as Exhibit 1 to the Affidavit of Kevin Webb in Support of InterDent's Motion for Temporary Restraining Order) (excerpts from the Employment Agreement are attached as Exhibit 5 to Affidavit of Scott J. Kaplan in Support of InterDent's Opposition to Misner's Rule 12(b)(6) Motion to Dismiss Counterclaim).

⁴ Misner admits that many of the staff of Kidds Dental here in Pocatello are former Dental Group employees but neither he nor Dr. Larry Bybee solicited any of these current employees of Kidds Dental while they were employed by Dental Group.

⁵ The Non-Compete Agreement between InterDent's alleged predecessor GMS Dental Group Management, Inc. and Misner is attached as Exhibit 1 to the Affidavit of Kevin Webb in Support of InterDent's Motion for Temporary Restraining Order ("Webb Affidavit").

⁶ In InterDent's counterclaim against Group and Misner, InterDent alleges that it executed the Management Agreement in October 1996 between InterDent and Dental Group in reliance on the non-compete agreement between InterDent and Misner and the employment

about Misner's practice in Pocatello nor attempted to enforce the non-competition clause present in its employment agreement with Misner.

Therefore, prior to reviewing the Idaho law applicable to non-compete agreements and applying that law to the specific non-compete agreement between InterDent and Misner, this Court will need to address certain preliminary matters. First, can a defendant enforce a non-compete agreement with a former employee of the plaintiff but not the defendant so as to prevent that former employee from competing with that plaintiff employer? Here Defendant InterDent is asking this Court to protect the interest of Plaintiff Dental Group.

Second, can an allegedly third party beneficiary of an employment agreement between an employer and employee enforce its own separate non-compete agreement with that employer's former employee to prevent that employee from competing with the employer without the permission or participation of that employer? Stated differently, could other businesses doing business with the Dental Group such as the lessor of the office or the cleaning service, for example, seek to protect their business relationship with Dental Group by obtaining non-compete agreements with InterDent's employed dentists?

agreement between Misner and Dental Group. See *InterDent's Amended Answer and Counterclaim*, Counterclaim ¶ 120. It is compliance with this same Management Agreement that is at the basis of the dispute between Plaintiff Dental Group and Defendant InterDent.

⁷ Defendant InterDent has asserted breach of contract, breach of fiduciary duty, breach of the covenant of Good Faith and Fair Dealing, Abuse of Process, Breach of Fiduciary Duty, Fraud in the Inducement, Illegality and Mutual Mistake in its counterclaim against Plaintiff Dental Group and Plaintiff Dental Group has asserted breach of contract, breach of fiduciary duty, breach of the covenant of Good Faith and Fair Dealing against Defendant InterDent. All claims and counterclaims between Defendant InterDent and Dental Group relate to the Management Agreement which forms the sole basis for the legal relationship between InterDent and Dental Group.

Third, can any person enforce a non-compete agreement with one person to prevent that person from competing with another? InterDent offers no justification for its necessary contention that one may legally contract to protect another from competition in its Memorandum in Support of Motion for Temporary Restraining Order. Fourth, can a foreign for profit corporation ever enforce a non-compete agreement in Idaho preventing a professional employee such as a licensed dentist from competing with the employee's former employer, a professional corporation? Misner respectfully submits that the answer to this question, as well as the other three, is "no".

ARGUMENT

Misner does not dispute InterDent's factual allegation that he (Misner) has decided to continue his practice of pediatric dentistry in association with Dr. Larry Bybee at "Kidds Dental" located at 716 Yellowstone Ave. in Pocatello Idaho⁸. InterDent has not questioned the right of Dr. Bybee to leave the Dental Group and go into practice in Pocatello. Furthermore, Misner does not dispute the applicability of the two tests applied in the Ninth Circuit to motions for preliminary injunctions: (1) the "traditional" test requiring the movant to show (a) the moving party will suffer irreparable harm (b) the moving party will probably prevail on the merits (c) in balancing the equities, the non-moving party will not be harmed more than the moving party is helped by the injunction and (d) granting the injunction is in the public interests and (2) the

⁸ At his deposition given on Friday June 26, 2004, Dr. Bybee testified that he is the sole owner of "Valley Dental" d/b/a as "Kidds Dental" and Dr. Misner is a contract employee of Valley Dental. Dr. Bybee further testified that both he and Dr. Misner began to see children at Kidds Dental on June 11, 2004. Valley Dental does have an office in Burley Idaho where Dr. Misner has seen patients prior to June 11, 2004. At the time of this briefing, the transcript of the deposition of Dr. Bybee is not yet available.

“alternative” test requiring the movant to show either (a) a combination of probable success on the merits and the possibility of irreparable harm or (b) that serious questions of are raised and the balance of hardships tips sharply in the moving party’s favor. *Stanley v. University of Southern California*, 13 F.3d 1313, 1319 (9th. Cir. 1994). The two formulations of the “alternative” test are “really nothing more than descriptions of the two ends of a ‘sliding scale in which the required degree of irreparable harm increases as the probability of success decreases.’” *Briggs v. Sullivan*, 886 F.2d 1132, 1143 (9th. Cir. 1989) (*citations omitted*).

For clarity, Misner will respond to InterDent’s argument in the same order as they appear in *InterDent’s Memorandum in Support of Temporary Restraining Order* (“*InterDent’s Memorandum for TRO*”).

A. Relief Must be Denied Under the Traditional Test

1. Because the Non-Compete Agreement is Unenforceable as a Matter of Law, There is No Likelihood InterDent Can Possibly Succeed on the Merits.

InterDent is a Washington for profit management company seeking to enjoin an Idaho dentist from competing with Dental Group, an Idaho professional corporation, providing dental services to patients in an office in Pocatello Idaho which InterDent, “on an independent contractor basis provide[s] management services.” *Recital E of Management Agreement* (InterDent has admitted that the Management Agreement was executed by InterDent’s and Dental Group’s predecessors in ¶ 3 of InterDent’s Amended Complaint and Amended and Supplemental Counterclaims and Third-Party Complaint.).⁹ InterDent seeks to enjoin Misner’s

⁹ The Management Agreement is attached as Exhibit A to the Affidavit of Ivar Chhina in Opposition to Plaintiff’s Motion for a Preliminary Injunction (“Chhina Affidavit”).

practice of dentistry based solely on a non-compete agreement executed between InterDent's predecessor and Misner in October 1996.

But, the non-compete agreement between InterDent as a for profit corporation and Misner as a dentist is unenforceable and void as a matter of law. *See Worlton v. Davis*, 73 Idaho 217, 249 P.2d 810 (1952) (refusing to enforce non-compete agreement between physician and group as against public policy of Idaho because layperson was a partner in the group). "Whether a contract is illegal is a question of law for the Court to determine from all the facts and circumstances of each case." *Morrison v. Young*, 136 Idaho 316, 318, 32 P.3d 1116, 118 (2001).

[T]his Court in *Worlton v. Davis*, 73 Idaho 217, 223, 249 P.2d 810 (1952) upheld the dismissal of an action seeking to restrain a doctor from engaging in the practice of medicine. We found a non-compete agreement entered into by the partnership was void as against public policy because it was entered into by doctors and a layman. We again stated that if a contract is void as against public policy, the courts will refuse to enforce it and will leave the parties in the identical situation in which it finds them. However, in applying this principle to sustain the dismissal of the action, we left the parties as if no agreement were made.

Morrison, 136 Idaho at 319, 32 P.2d at 119. Here we have InterDent in the position of that "layperson" attempting to enforce its own non-compete agreement with Misner without the approval or participation of the Dental Group. The issue of the enforceability of InterDent's non-compete agreement under Idaho law is not debatable. The non-compete agreement is void and this Court must leave "the parties as if no agreement were made". *Id.*

InterDent does not provide any professional dental services and has never been the employer of Misner. Misner does not provide any management services and has never employed InterDent to provide him with management services. Therefore, InterDent and Misner could never be competitors and there has not been any legal relationship between them since 1996.

The missing link between InterDent and Misner is the Dental Group. The Dental Group both employed Misner and contracted for management services of its office from InterDent's predecessor. But, the Dental Group, *i.e.*, the only existing link between InterDent and Misner, has not joined InterDent in its Motion for a Temporary Restraining Order against Misner. In fact, Dr. Greg Romriell, the current President of Dental Group, testified at his deposition¹⁰ on Friday, June 25, 2004 that he did not attempt to enforce Misner's non-compete agreement because Interdent had breached the Management Agreement and thereby adversely affected Misner's practice while employed at Dental Group.

InterDent has submitted no authority from any jurisdiction showing that one party can legally contract with another party to protect a third party from competition. Idaho law is clear. "In order to be enforceable, a covenant not to compete must be ancillary to a lawful contract, supported by adequate consideration, and consistent with public policy. *Pinnacle Performance, Inc. v. Hessing*, 135 Idaho 364, 367, 17 P.3d 308, 311 (Ct. App. 2001) (*citing McCandless v. Carpenter*, 123 Idaho 386, 390, 848 P.2d 444, 447 (Ct. App. 1993)).

What contract is InterDent's non-compete agreement with Misner alleged to be "ancillary" to? Certainly not a contract of employment as InterDent has never claimed to have been the employer of Misner. Contrary to InterDent's contention that "Misner received \$400,000 in cash in connection with [InterDent's] predecessor's acquisition of [Dental Group] in 1996", *see Webb Affidavit* ¶ 6, InterDent did not and could not legally acquire Dental Group because Dental Group is a professional corporation providing dental services and InterDent is a for-profit corporation providing dental offices such as Dental Group with management services.

¹⁰ Dr. Greg Romriell's deposition transcript is not currently available.

InterDent admits this fact in paragraph one of the *Webb Affidavit*: "I am a Vice President, Operations, for defendant . . . [InterDent] with responsibilities for [InterDent's] (sic) offices in the state of Idaho, **including the office it leases and manages for plaintiff [Dental Group]** located at 4155 Yellowstone Ave., Pocatello Idaho 83202 (the Pocatello Idaho)." (*emphasis added*).

InterDent did not acquire Dental Group, rather it simply leases an office and provides management services for Dental Group "on an independent contractor basis" *Recital E of Management Agreement*. This fact is explicitly incorporated in the Management Agreement, Section 3.4 where it is stated in (a) that "[g]roup (Dental Group) shall have the sole responsibility and authority for all aspects of the practice of dentistry" and (b) that "[m]anager (InterDent) shall have the sole responsibility and authority for decisions related to the administration of the Practice". Management Agreement, Section 3.4, (a), (b). In 1996 InterDent's predecessor "acquired all of the **nonprofessional assets of the dental practice presently conducted by plaintiff [Dental Group]** . . . in exchange for payment of \$2.8 million in cash and stock to the shareholders of the Group, including affiants L.R. Misner, Jr. and Dwight Romriell, who were each paid \$400,000." *Chhina Affidavit*, ¶ 2 (*emphasis added*).

As the Court of Appeals held in *McCandless v. Carpenter*, 123 Idaho 386, 392, 848 P.2d 444 (Ct. App. 1993) (*citing* the Restatement of Contracts, § 188 comment c (1981)), "the restrictive covenant at issue is not ancillary to a contract in which it is generally recognized that there may be a legitimate interest to protect". The only other contract ever existing between InterDent and Misner occurred almost 8 years ago and pertained only to the sale of his "nonprofessional assets". Misner's sale of his "nonprofessional" assets to InterDent eight years

ago provides InterDent with no legitimate interest in his "professional" practice to protect now through enforcement of a restrictive covenant. For all the reasons discussed above, InterDent fails to satisfy the "traditional" test requirement of showing it has a "reasonable chance of success" and, for this reason its motion for a temporary restraining order.

2. InterDent Will Suffer No Harm Absent A Temporary Restraining Order.

Here InterDent claims that it must only show "that it will suffer a degree of hardship that outweighs the hardship facing the opposing party because "there is a strong probability of success on the merits". *InterDent's Memorandum for TRO*, pp 7-8. As discussed above, InterDent has essentially no chance of succeeding on the merits and therefore the "irreparable harm" requirement poses a significant hurdle to InterDent. Furthermore, because InterDent has no relationship with any potential dentist with which Misner might compete other than through its Management Agreement with Dental Group whereby it provides Dental Group with an office and management services for a fee as an independent contractor, its potential "harm" due to Misner can be no more than its net profits under that Management Agreement with Dental Group.

Because this litigation began well before Misner left his employment at Dental Group, InterDent's "harm" must be calculated based upon InterDent's net profits from its Management Agreement with Dental Group while InterDent and Dental Group are suing one another for breaching that agreement. In fact, InterDent claims that in September 2003, before Misner resigned from the group, the Dental Group was unprofitable on an accrual basis. *Chhina Affidavit*, ¶ 22. During his deposition, Dr. Greg Romriell testified that, based upon information

provided him by InterDent, InterDent has been losing money on the Dental Group contract for at least the last three months. Therefore, at the time the alleged "competition" began in June of this year, InterDent had no reasonable expectation of profit to lose based upon the Dental Group contract.

InterDent has failed to show any evidence that any alleged harm from Misner's potential competition with Dental Group somehow flowed to the Dental Group's independent contractor InterDent by way of the Management Agreement that InterDent claims is being breached by Dental Group. If InterDent revenues collected from the Dental Group are falling, InterDent bears the burden of showing that those falling revenues are the result of competition from Misner rather than from its ongoing "(mis)management of" and "litigation with" Dental Group. Unless InterDent presents evidence that the Dental Group would in fact be operated profitably under the current circumstances absent Misner's competition, InterDent cannot possibly show that Misner's competition caused it any harm because InterDent is paid only from the profits of the Dental Group. In the extreme case that Dental Group ceased to operate, InterDent would suffer harm only if InterDent would have profited from its Management Agreement absent Misner's competition. InterDent has not even attempted to make such a showing.

No one disputes that Dental Group dentists including Misner have the right to terminate their employment with Dental Group. Likewise, no one will dispute that when dentists leave, gross revenues for a practice falls. But, this case is not about Misner's leaving the Dental Group, instead its about Misner's alleged competition with the Dental Group after he left. But, the fact is that Dental Group and Kidds Dental do not compete because Dental Group does not treat children and Kidds Dental does not treat adults. Dental Group's President, Dr. Greg Romriell

testified at his deposition that neither he nor any of the remaining dentists at Dental Group are trained or competent to provide the kind of pediatric services provided by Misner. Dr. Bybee testified at his deposition that Dental Group was actively referring children to Kidds Dental because dentists in Dental Group were neither trained to treat children or comfortable with having children in their practice. Therefore, because the evidence is undisputed that the Dental Group as it exists today neither desires to or is capable of treating children, InterDent cannot possibly be harmed by Misner's practice at Kidd's Dental.

3. A Balancing of the Hardships Favors Denying InterDent's Request for a Temporary Restraining Order.

Enjoining Misner or any other dentist from practicing dentistry in Pocatello certainly creates a greater hardship on that individual dentist than allegedly decreasing the profit margin of an independent contractor working for one dental practice in Pocatello would create on a large foreign for-profit corporation managing multiple dental practices across the country .

4. InterDent's Requested Temporary Restraining Order Would Violate Idaho's Public Policy.

Not only would the children of Pocatello needing pediatric dental services be harmed by enjoining Misner from working at Kidds Dental here in Pocatello, but, as described in detail above, the public policy of the State of Idaho in not allowing lay persons to control the practices of doctors and dentists would be violated.

B. InterDent Fails to Meet the Alternative Test.

As discussed above, because InterDent has essentially no chance of success on the merits, no evidence of harm and the requested relief would directly violate the public policy of the State of Idaho, InterDent's Motion for a Temporary Restraining Order should be denied under the

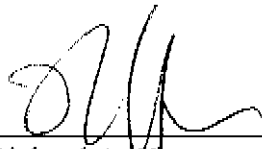
alternative test.

CONCLUSION

InterDent's Motion for a Temporary Restraining Order must be denied as InterDent has failed to show either any (1) chance of success on the merits or (2) irreparable harm.

DATED this 25th day of June, 2004.

RACINE, OLSON, NYE, BUDGE
& BAILEY, CHARTERED

By 
Richard A. Hearn

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 25th day of June, 2004, I served a true and correct copy of the above and foregoing document to the following person(s) as follows:

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